

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
REPLY BRIEF**



ORIGINAL

✓  
PJS

**74-1047**

*To be argued by*  
JOHN E. JAY

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**United States Court of Appeals**  
**FOR THE SECOND CIRCUIT**

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UNITED OPTICAL WORKERS UNION LOCAL 408,  
affiliated with the INTERNATIONAL UNION OF ELEC-  
TRICAL, RADIO & MACHINE WORKERS, AFL-CIO,

*Plaintiff-Appellee,*

—against—

STERLING OPTICAL COMPANY, INC.,

*Defendant-Appellant.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

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**REPLY BRIEF FOR DEFENDANT-APPELLANT**

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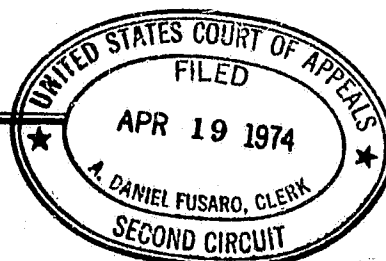
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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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Docket No. 74-1047

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UNITED OPTICAL WORKERS UNION LOCAL 408,  
affiliated with the INTERNATIONAL UNION  
OF ELECTRICAL, RADIO & MACHINE WORKERS,  
AFL-CIO,

Plaintiff-Appellee,

-against-

STERLING OPTICAL COMPANY, INC.,

Defendant-Appellant.

---

On Appeal from the United States District Court  
for the Eastern District of New York

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REPLY BRIEF FOR DEFENDANT-APPELLANT

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This reply brief by Sterling Optical Company, Inc., defendant-appellant, is directed primarily to the legal propositions asserted by United Optical Workers in its answering brief (Union brief, pp. 10-22) which, it is submitted, are not supported in law. In addition, as is also shown herein, that brief carefully seeks to disguise in its summary of the facts (Union brief, pp. 6-9) the

central fact that the Union is here seeking to obtain, with judicial sanction, enforcement of the illegal subcontracting condition contained in Article XXVIII of the collective bargaining agreement between the Company and the Union, which lies at the core of the dispute.

1. The Union Does Not Controvert  
The Illegality Of The Subcon-  
tracting Clause Under Section  
8(e) Although It Is The Clause  
Sought To Be Enforced

In its Statement of the Case, the Union's brief (p. 8) carefully omits from the description of the Union's demand for arbitration any mention of the crucial undisputed fact that the demand explicitly included the following question:

"15. Is the Employer violating Article XXVIII of the parties' contract, by subcontracting out laboratory work performed by bargaining unit employees at the Brooklyn Plant to non-union establishments?" [JA 27a-28a, see also Co. main brief, pp. 13-14].

Despite this careful omission in its factual summary, the Union's two later (although erroneous, see infra, pp. 9-11) contentions reveal the crucial importance of Article XXVIII - the only provision in the collective bargaining agreement concerning subcontracting - to the Union's entire case. The Union first argues: "The Court [below] here, by its actions, made any resort to arbitration futile. For by striking the subcontracting clause [in its entirety] there was little left for the arbitrator to con-

sider" (Union brief, p. 17). Still later the Union argues: "The submission of a revised subcontracting provision as proposed by the [Company] would, leave an arbitrator with no alternative but to render a decision in favor of the [Company]" (Union brief, p. 21). Stated otherwise, if Article XXVIII is either entirely deleted or is modified only by deleting the illegal condition limiting subcontracting to "Union establishments"<sup>1</sup> the arbitrator must find for the Company. Then, the Union contends only by leaving Article XXVIII completely intact without deleting the illegal condition, does there remain any issue for the arbitrator to decide. Indeed, this contention is made explicit by the concluding request in the Union's brief (p. 23) that this Court modify "the judgment of the Court below. . .to the extent the Court below found Article XXVIII to be unenforceable and void."

Nevertheless, at no point in its answering brief does the Union even attempt to controvert or even mention the abundant uniformly consistent legal precedent, fully

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<sup>1</sup>The Union's brief inaccurately refers to Article XXVIII as limiting the Company's subcontracting of work to "union establishments" (Union brief, pp. 19, 22). Article XXVIII explicitly refers to "Union establishments" and the preamble, no less explicitly, defines "Union" as "United Optical Workers Union, Local #408, IUE, AFL-CIO, of 200 Park Avenue, South, New York, New York" [JA 9a]. And, in any event, a clause restricting an employer's right to union establishments generally rather than to establishments organized by a particular union does not avoid the interdictions of Section 8(e). See generally the discussion in Point II of the Company's main brief, pp. 24-30. See also District 9, International (Con't. on pg. 4)

cited and discussed in the Company's main brief (Point II, pp. 24-31), that: Article XXVIII violates Section 8(e) of the National Labor Relations Act by illegally conditioning the right of the Company to subcontract work upon sending the work only to "Union establishments;" and that, therefore, in the precise words of Section 8(e), Article XXVIII is "to such extent unenforcible and void." The Union even goes so far as to admit - as indeed it must - that Article XXVIII clearly permits the Company to "subcontract out bargaining unit work to other establishments provided said establishments were union establishments" (Union brief, p. 19; see also p. 22). And it is this very proviso which the Union, in question 15 of its demand for arbitration, unequivocally seeks to enforce with the sanction of this Court but without any effort to controvert the illegality of that provision. Conversely, it is the proviso to Article XXVIII and only this proviso which the Company submits must be deleted as indisputably

(Con't. from pg. 3)

Association of Machinists v. NLRB, 315 F.2d 33, 36-37 (D.C. Cir. 1962); and Hoffman v. Teamsters Local 386, 54 L.R.R.M. 2283, 48 LC ¶18,449 (D.C.N.D. Cal. 1963), where the Court held a similar clause violated Section 8(e), stating: "Although the proscription is not so narrow as to limit hauling to those subcontractors affiliated with the instant union, it is clear that a union agreement of some sort, with a 'recognized' union is required. Even this limitation, is too narrow, and violates the provisions of Section 8(e) of the Act." Citing Hoffman v. Joint Council of Teamsters No. 38, 230 F.2d 684 (N.D. Cal. 1962), aff'd. 338 F.2d 23 (9th Cir. 1964) [54 L.R.R.M. at 2284].

violative of Section 8(e) (see Co. main brief, pp. 24-31) before the Court may order arbitration under Section 301 of the Labor Management Relations Act.<sup>2</sup>

2. No Case Has Been Cited Holding  
That District Court Exceeds Its  
Jurisdiction In A Section 301  
Action To Compel Arbitration By  
Determining The Legality Of A  
Clause Under Section 8(e)

Because of the absence of any legal authority upholding the validity of Article XXVIII under Section 8(e), the Union is perforce compelled to take the bold legal position that the District Court exceeded its jurisdiction under Section 301 of the Labor Management Relations Act in determining the invalidity of Article XXVIII (Union brief, pp. 10, 2-17). But the Union has cited not a single case so doing.

At the outset, in making this argument, the Union wholly ignores the procedural posture of the case in the Court below viz., that the Company counterclaimed for declaratory judgment that Article XXVIII of its agreement is unenforceable to the extent it violates Section 8(e)

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<sup>2</sup>Under these circumstances, there is no need to dignify the Union's specious suggestion in its brief (p. 11) that the Company is "confused with respect to its position" as to the clause of Article XXVIII which should be deleted. For, under either alternative wording of Article XXVIII requested by the Company in its main brief (p. 47), it is the illegal proviso of Article XXVIII which the Company submits must be declared illegal. There is no confusion in the Company's position. Neither is the Union confused as to the Company's position.

of the National Labor Relations Act and to restrain the Union from arbitrating under that Article to that extent, and moved for summary judgment in its favor (Co. main brief, pp. 5-6; JA 39a-44, 75a). Likewise, the Union moved for summary in its favor to dismiss the Company's counterclaim and compel arbitration (Co. main brief, pp. 5-6; JA 77a-78a).

In this procedural context, the Court was obligated, as it did, to assert jurisdiction under Section 301 of the Labor Management Relations Act to determine the extent to which Article XXVIII violated Section 8(e). This Court expressly so held in the identical procedural posture as the instant case in Todd Shipyards Corporation v. Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO 344 F.2d 107, 108 (2d Cir. 1965), aff'g. 232 F. Supp. 589, 591-592 (E.D.N.Y. 1964). See also the cases cited and discussed in the Company's main brief (Point I, pp. 18-23). Nothing in this Court's (or in the District Court's) elucidation of that basic holding suggests, as does the Union (Union brief, p. 15), that the question of the District Court's jurisdiction was of only "peripheral" concern. Like the Union here, so there, the union argued, in an effort to defeat the employer's action for declaratory judgment under Section 301 of the Labor Management Relations Act, that the District Court lacked jurisdiction to determine the validity

of the subcontracting clause under Section 8(e) where the labor agreement contained an arbitration provision. [232 F. Supp. at 591; 344 F.2d at 108]. That contention was thoroughly explored by both Courts and rejected in explicit terms by both Courts [232 F. Supp. at 591-592; 344 F.2d at 108].

The same is true of Paramount Bag Manufacturing Co., Inc. v. Rubberized Novelty and Plastic Workers' Union, Local 98, I.L.G.W.U., 353 F. Supp. 1131 (E.D.N.Y. 1973), notwithstanding the Union's disingenuous effort (Union brief, pp. 16-17) to describe the case as holding that, in a Section 301 action, the District Court is required to direct arbitration and has jurisdiction to review the legality of a clause under Section 8(e) only in an action to confirm the award. For the Paramount Bag case clearly holds to the contrary. The language initially quoted by the Union from that case (Union brief, p. 16) stops immediately before the following:

" . . . As previously noted, the union is complaining; that Paramount is purchasing from other concerns the products it sells while laying off its union employees and failing to supply them with work. This the union regards as a breach of Paramount's obligations under paragraph 26 of the labor agreements, supra, p. 1133.

Paramount disputes the union's right to arbitrate on two grounds: (1) the aforesaid paragraph 26 is void and unenforceable as an unlawful "hot cargo" clause violative of Section 8(e) of the National Labor Relations Act, 29 U.S.C. §158(e); and (2) the union procured Paramount's renewal of the 1972-1975 labor agreement by falsely representing

it would not enforce paragraph 26 as against Paramount.

Paramount has cited no authority holding or even suggesting that a clause like paragraph 26 in the labor agreements here involved is a "hot cargo" clause which is void and unenforceable as an unfair labor practice condemned by Section 8(e). Certainly nothing said in McLeod v. Amer. Fed. of Television & Radio Artists, 234 F. Supp. 832 (S.D.N.Y. 1964), affd. 351 F.2d 310 (2 Cir. 1965), should prompt such a conclusion. Granted that a court should not enforce an illegal agreement even by way of permitting an arbitration, as McLeod suggests, such an agreement ought to at least appear to be so before a court disregards the national labor policy of encouraging resort to arbitration in labor matters. See Boys Markets, supra, 398 U.S. at 241, 90 S.Ct. 1583, and Carey v. General Electric Company, 315 F.2d 499, 509 (2 Cir. 1963)." [353 F. Supp. at 1136-1137; emphasis added.]

Immediately following the initial excerpt from Paramount Bag, the Union's brief (p. 16) proceeds to discuss the quotation from the District Court's discussion in Paramount Bag, which quoted from Carey v. General Electric Corp., 315 F.2d 499 (2d Cir. 1963), but again carefully stops short before the following language from the District Court's opinion:

"Furthermore, and without trenching upon the as yet unexercised jurisdiction of the arbitrator, the authorities cited by the union strongly suggest that paragraph 26 is not a "hot cargo" clause at all. In National Woodwork Manufacturers Association v. N.L.R.B., 386 U.S. 612, 87 S.Ct. 1250, 18 L.Ed.2d 357 (1967), Section 8(e) was held not to 'prohibit agreements made and

maintained' on behalf of employees 'to pressure their employer to preserve for themselves work traditionally done by them.' Id. at 635, 87 S.Ct. at 1263. The Court noted that in its earlier decision in Fibreboard Paper Products Corp. v. N.L.R.B., 379 U.S. 203, 85 S.Ct. 398, 13 L.Ed.2d, 233 (1964), it had implicitly recognized 'the legitimacy of work preservation clauses' and had 'held that bargaining on the subject was made mandatory by §8(a)(5).' Id. 386 U.S. at 642, 87 S.Ct. at 1267. Thus, paragraph 26 here could well be viewed as an entirely lawful work preservation clause." [353 F. Supp. at 1137; emphasis added.]

In short, stripped of the Union's artful tailoring of the language from the decision of the District Court to support its position, the Paramount Bag decision indisputably stands for these propositions: (i) in an action to compel arbitration, the District Court has jurisdiction to determine the legality under Section 8(e) of a contractual clause sought to be arbitrated before the Court directs arbitration; (ii) in the words of the District Court quoted above, "a court should not enforce an illegal agreement even by way of permitting arbitration"; and (iii) the District Court must, as it did in that case (and as the Court below did in this case) determine the legality of the contested clause on its face under Section 8(e) and such determination does not "trench upon the as yet unexercised jurisdiction of the arbitrator." The fact that the District Court found, on the merits, in Paramount Bag, supra, that the contested clause there was a valid "work preservation clause", does

not in any way detract from the District Court's jurisdiction to make the determination of the clause's illegality under Section 8(e). This is especially so where, as here, the Union has not even contested in this Court the manifest invalidity of the subcontracting clause.

3. The District Court Did Not  
Invade The Jurisdiction Of  
The Arbitrator Under The  
Decided Cases

From the foregoing it is clear that, despite the Union's repeated arguments throughout its brief (Union brief, pp. 10, 13-17, 21), the Court below did not invade the area reserved to the arbitrator by determining that Article XXVIII on its face patently exceeds the bounds of Section 8(e). For, even assuming as the Union argues, that the arbitrator can only decide in favor of the Company if either the entire Article XXVIII or only its illegal proviso is deleted in accordance with Section 8(e), this does not establish that the Court has invaded the arbitrator's domain; and, in any event, the underlying assumption of the Union's argument is unsound.

Upon analysis, the Union's argument is ostensibly based upon the Supreme Court's decision in United Steelworkers of America v. American Manufacturing Corp., 363 U.S. 564, 566-567 (1960) which rejected the Cutler-Hammer<sup>3</sup>

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<sup>3</sup>International Association of Machinists v. Cutler-Hammer Inc., 271 App. Div. 917, 67 N.Y.S.2d 692 (1st Dept. 1947) aff'd 297 N.Y. 519, 74 N.E.2d 464.

doctrine, viz., that if the meaning of a provision of a contract sought to be arbitrated is beyond dispute there is nothing to arbitrate and the contract cannot be said to provide for arbitration. From this the Union invalidly asserts that if there is only one way for the arbitrator to decide, then if Article XXVIII is modified or deleted, then the District Court must have exceeded its jurisdiction and invaded that of the arbitrator. But the Union's argument proves too much. It is, in fact, an open invitation to the Court to invade the area reserved to the arbitrator by asking the Court to ascertain whether, if Article XXVIII is deleted or only its illegal proviso is excised, anything is left for the Union to arbitrate. And it directly contravenes the admonition of the Supreme Court in United Steelworkers of America v. American Manufacturing Corp., supra, 363 U.S. at 564 that, in determining whether or not to order arbitration, "the courts have no business weighing the merits of the grievance, . . . or determining whether there is particular language in the instrument which will support the claim"; for whether there is a "meritorious grievance" or a "frivolous claim" is irrelevant, inasmuch as "when the judiciary undertakes the merits of a grievance. . . it usurps a function which under the regime is entrusted to the arbitration tribunal" [363 U.S. 569]. So here, too, it is irrelevant that there may be little substance to the Union's claim to be arbitrated after

deleting Article XXVIII in its entirety, or only its illegal proviso limiting subcontracting to "Union establishments." Of still greater importance is the fact that the Court below adopted this very same erroneous reasoning as the ground for refusing to delete only the illegal proviso of Article XXVIII (see Company's main brief, pages 41-44).

Moreover, even if only the illegal proviso of Article XXVIII is deleted in order to conform to Section 8(e), it does not mean that there is nothing left for the arbitrator to determine. Without attempting to suggest to the Union the arguments which it may submit in arbitration, should the Court delete the illegal proviso of Article XXVIII or all of Article XXVIII, it is anticipated the Union will raise questions with respect to the type of work which had been previously contracted out by the Company, the volume of work which had been contracted out by the Company, whether certain oral understandings had been reached between the Union and the Company with respect to subcontracting (as did the Union in Paramount Bag), and what damages, if any, were incurred by the employees by virtue of the decision of the Company to change its operations at the Jay Street facility.<sup>4</sup>

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<sup>4</sup>Indeed, in oral argument before the Court below (transcript of September 26, 1973 pp. 35-38), counsel for the Union did urge such arguments. The full text of these pages is set forth in the Appendix to this brief.

All of these questions are manifestly issues which are properly directed to the arbitrator. The fact that these contentions may not be meritorious in the arbitration is, of course, as already noted, irrelevant to the issue of whether the Court may direct arbitration under the collective bargaining after modifying Article XXVIII by the deletion of the illegal proviso limiting subcontracting to "Union establishments," or striking Article XXVIII in its entirety.

4. Excision Of Only The Illegal  
Proviso Of The Subcontracting  
Clause To Conform To Section  
8(e) Leaves That Clause Closest  
To The Actual Intent Of the  
Parties

In a final effort to avoid the consequences flowing from the illegal proviso to the subcontracting clause in Article XXVIII of the collective bargaining agreement, the Union argues against deletion of only the illegal proviso (Union brief, pp. 18-22) on two grounds: that such deletion would distort Article XXVIII which permits subcontracting by the Company to other establishments without limitation except that such other establishments are "Union establishments"; and that Section 8(e) of the National Labor Relations Act does not permit partial deletion of an illegal clause. Neither argument is valid. The short and complete answer to both arguments is that the only distortion effected by deleting the illegal limitation of subcontracting to "Union establishments" is mandated by Section 8(e); for Article XXVIII, in the

precise statutory language, is "unenforcible and void" only "to such extent" of containing the illegal limitation.

Moreover, without repeating the argument in the Company's main brief (pp. 38-40), deletion of the illegal proviso of Article XXVIII under Section 8(e) - not total elimination of Article XXVIII - leaves that Article nearest to the intention of the parties in view of: (i) the parties did bargain about subcontracting; (ii) the parties agreed that the Company could continue to subcontract out bargaining unit work; (iii) the language contains no limitations with respect to the amount of work to be sent out; (iv) the provision contains no restriction as to the type of work to be sent out; (v) the Article does not limit subcontracting by the effect upon the Company's employees represented by the Union; (vi) Article XXVII recognizes the Company's unilateral right "to close a Branch" [JA 19a]; (vii) Article XXV(i) explicitly recognizes the retention by Sterling of the "rights as are usually Management's function" [JA 18a]; and (viii) the Union concedes that it has, in the past, acquiesced in the subcontracting out of work by the Company [see Appendix to this brief]. Elimination of Article XXVIII would ignore these undisputed and indisputable manifestation of the intention of the parties. In contrast, deleting only the illegal proviso but leaving Article XXVIII intact recognizes the "actual existence" of this provision "which

cannot be justly ignored." NLRB v. Rockaway News Supply Company, Inc., 345 U.S. 71, 77 (1953).

Under these circumstances, Section 8(e) fully warrants deletion of the illegal proviso to Article XXVIII as the courts have done, and as has the National Labor Relations Board in the numerous cases cited in the Company's main brief (pp. 33-38). None of these decisions are refuted by the Union in its brief. Neither can the cases be validly distinguished from this case.

#### CONCLUSION

For the reasons set forth in the Company's main brief, as amplified by this reply brief, the judgment of the Court below should be modified as requested in the Company's main brief (pp. 47-48).

Respectfully submitted,

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April 19, 1974

APPENDIX

Transcript Pages 35-38 of Oral Argument Before Honorable  
Jacob Mishler, September 26, 1973, in United Optical Workers  
Union v. Sterling Optical Co., 73 Civ. 1444

1  
2 the notice of arbitration? Why on the 15th?

3 MR. ZISKIN: On the 15th we didn't  
4 know that they were going to let go the  
5 collective bargaining agreement. We knew they  
6 were letting go some apprentices.

7 THE COURT: When did you first know?

8 MR. ZISKIN: No earlier than the 17th.

9 MR. JAY: May I say something? The  
10 union does know that we have been contracting  
11 out work. The same provision has been in  
12 that contract for years. We have contracted  
x 13 our work. The union is fully aware of it.

14 THE COURT: Why is this different from  
15 all the other steps you have taken?

16 MR. JAY: I would say it is not, and  
17 I'd say it's consistent with our past practice.

xx 18 THE COURT: But you are setting down a  
19 division or some operation.

20 MR. JAY: That's correct; and I say  
21 when we get to the merits of it that will be  
22 our contention. What has happened here --

23 THE COURT: I'd better get to the stacks  
24 and start doing some work.

25 MR. ZISKIN: If I may be heard, I under-

1  
2 stand that there has been some contracting  
3 out, but it's not the type of work that is  
4 now being subcontracted out. It is my under-  
5 standing that the company traditionally  
6 contracted out work, we didn't object to that.  
7 Now they are assigning contracting work, not  
8 only subcontracting it out; they are closing  
9 down the laboratory. It's not that they are  
10 going to maintain the laboratory and they are  
11 going to take some of the laboratory work  
12 that was performed by the employees, they are  
13 going to close down and give all the work out.  
14 That, to my mind, is substantially different.

15 THE COURT: Have they ever contracted  
16 any of the laboratory work out?

xx 17 MR. ZISKIN: Not of work judicially  
18 performed by the bargaining union. This company  
19 is engaged in the fabrication of lenses for  
20 eyeglasses, and the fabrication of lenses.  
21 It's complicated, of course, by the nature of  
22 the prescription. Some work, as I understand,  
23 has always been done by the bargaining union  
24 employees at the Jay Street location. How-  
25 ever, there was some work over and above that

1  
2 which the company, as I understood, said that  
3 their employees could not perform, and that  
4 they did not have possibly the machinery to  
5 perform, which was always contracted out.

6 Now, we never complained about that. We never  
7 had that work, as I understand it, and we never  
8 had any complaint when they subcontracted it  
9 out.

10 Now our contention is that they take the  
11 work that we've always performed and now they  
12 are subcontracting out that work. There is a  
13 distinction, as I see it, in those two situations.  
14 When you contract work that I never had,  
15 I can't complain.

16 THE COURT: Is this true?

17 MR. JAY: My understanding is that we  
18 have contracted work traditionally out to bar-  
19 gaining union people also.

20 THE COURT: Since you are in a contractual  
21 relationship with this union --

22 MR. JAY: For years.

23 THE COURT: They have lost jobs through  
24 it.

25 MR. JAY: They have not gained jobs.

1

2

THE COURT: So this is the difference.

3

MR. JAY: Yes, it is. The extent of it.

4

THE COURT: There are seventeen jobs

5

lost?

6

MR. ZISKIN: Total of thirty-six.

7

MR. JAY: The number is correct.

8

THE COURT: That's a difference.

9

I don't know what else you can add to it.

10

As I say, I have work to do. I hope that

11

I can finish it today. I even let my staff off

12

Thursday and Friday. When they say there ought

13

to be a law against it, there ought to be a

14

law against lawyers coming into court the

15

last minute, when a Judge hasn't been able

16

to make a decision. It's a gamble that lawyers

17

play in the law offices. Serve the notice at

18

ten minutes to five, just when he's closing

19

the office on Friday before the 4th of July.

20

It's difficult to understand between lawyers --

21

why do it to the Court, I don't know.

22

MR. ZISKIN: Your Honor, I would

23

respectfully say that I am positive, I know

24

that I did not intend to do that to the Court.

25

I have my own problems with regard to the holiday.



<sup>Two (2)</sup>  
Service of ~~three (3)~~ copies of the within  
*Kepley King* is hereby admitted  
this 19<sup>th</sup> day of April, 1974

*SIPSEB, [Signature], Haysport, D.C.*

Attorney(s) for *[Signature]*

